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Supreme Court of the United States

OCTOBER TERM, 1938

No. 590

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

No. 591

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A.G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A.G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A.G., a Liechtenstein corporation,
Respondents.

On Writs of Certiorari to the Supreme Court of the State of New York, New York County.

PETITIONER'S REPLY BRIEF

FREDERICK H. WOOD,
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PETITIONER'S REPLY BRIEF

I.

THE MEANING OF "OBLIGATION" IS A FEDERAL, NOT A STATE, QUESTION.

It is argued that, under the doctrine in the *Erie Railroad* case, 304 U. S. 64, the Court of Appeals of the State of New York has finally determined that the word "obligation" in the Joint Resolution means a "debt" or "legal liability", and not a contract. The inference is drawn that this decision is binding upon this Court.

If this position be sound then it follows that the Joint Resolution means something different in every State. The Court of Appeals may construe it one way;[1] the Supreme Judicial Court of Massachusetts another way; and the highest court of Louisiana a third way.[2] But it is inadmissible to argue that a Joint Resolution of the Congress expressive of a national public policy should be so construed (at least, unless the language absolutely compels such construction) as to deprive the Resolution of uniformity.

The argument, therefore, turns on its maker, and provides another, and to our minds unanswerable, ground for declining to construe the word "obligation" in the way contended for by the respondents. The courts must give to the word "obligation" the construction that the Congress intended, and must presume that that construction was intended to be uniform. The only construction that meets this standard is the construction which interprets "obligation" as covering *all* contracts which may be paid in money of the United States.

II.

Application of the Joint Resolution to foreign money provisions does not compel its application to wheat or other mere commodity provisions.

The respondents have argued that these foreign money provisions must be treated exactly like

[1] Indeed, two judges of the Court of Appeals dissented, implying that another court might well give a different construction.

[2] A likely contingency, as the general system of law in Louisiana rests on different (civil law) foundations.

ordinary commodity provisions, for example, as if contained in coupons reading:

> "Bethlehem Steel Company will pay to the bearer at its office or agency in the City of New York $25 United States gold, or deliver in London, 25 bushels of Number 1 Winter Wheat."

And then the question is asked by counsel on the other side: "Would our courts refuse to give recovery in the number of dollars representing the exchange value of Number 1 Winter Wheat delivered at London?"

But the argument leads nowhere, for no reason appears why the Congress should be inhibited, in enacting legislation of public import, from recognizing plain economic facts. In *Deutsche Bank Filiale v. Humphrey*, 272 U. S. 517, this Court distinguished between foreign money and an ordinary commodity, and applied to a default in payment of foreign money a rule different from that applicable to a failure to deliver a commodity abroad.

No financier or business man, at least during the period of free international exchange during which these bonds were being issued, ever regarded an obligation to pay alternatively in dollars in New York or pounds sterling, as other than providing two *money* alternatives.

The whole conception that provisions for payment in pounds sterling, guilders or Swiss francs alternatively to dollars must be treated by the Congress exactly like agreements to deliver wheat, horses or rare folio manuscripts, parts company with reality and common sense. It is common ground between all parties that the Congress, in adopting the Joint Reso-

lution, was thinking of the typical corporate and governmental bond issues. But no one ever saw or conceived of a bond issue providing that each holder should receive $1;000 in New York, or at his option, one fine Arabian steed at Tattersall's in London. The argument is at most a testimonial to the imagination of eminent counsel confronted by a case difficult of support in practical experience.

The governing consideration is that the provision for payment in foreign money is, and was intended as, a *substitute* money provision, and so falls within the principle of *Holyoke Water Power Company* v. *American Writing Paper Company*. 300 U. S. 324.

We need not concede that the language of the Resolution would not cover an alternative provision for discharge of a particular obligation by delivery of wheat or a horse or whatnot. But in any event, that is a different case; and the decision in this case will not preclude consideration of such a case if ever it arises.

III.

Significance attaches to the complete failure to attempt to meet certain of our arguments.

Without burdening this Reply Brief with repetition of the arguments themselves there is reasonable application for the presumption that an argument which the opposition has chosen wholly to ignore, is worthy of special consideration. We, therefore, respectfully call the Court's attention to the fact that neither the petitioner in No. 384 in its reply brief nor the respondents in Nos. 590 and 591, have ever made any real *attempt* to meet our arguments

(1) That if no alternative provision for payment in a medium other than United States money may fall within the condemnation of the Resolution, the Resolution does not reach an alternative provision for payment in gold bullion. But the Resolution plainly embraces obligations containing such alternative gold bullion provisions.

(2) That, if the bonds in suit do not become "obligations" (within the meaning of the Resolution) until the holders have elected where to demand payment, then the gold clause provisions themselves remain valid until the election, and if the election be to demand payment abroad (as in these cases), the gold clause provisions never become invalid at all; wherefore, even the express condemnation by the Congress of the gold clause provisions is nullified. The truth, of course, is that the Resolution condemns *all* gold clause provisions from the outset. But this could not be the case, if a bond or coupon never became an "obligation" (within the meaning of the Resolution) until after the election where to demand payment.

(3) That the ground upon which this Court sustained the Resolution in the *Norman* case, 294 U. S. 240, as an obstruction to the power of Congress over the currency was the dislocation of the domestic economy that would have resulted had debtors been required to collect their revenues in the new dollars and to pay their debts upon the basis of the old.

(4) That alternative foreign money payment provisions of this character can be employed in the future, under the respondents' view, with the effect of wholly nullifying the Resolution. The respondents' dilemma is brought into clear relief by the concession twice made by petitioner in No. 384 that the question whether provisions of this character are intended to evade the effect of the Resolution, "might become relevant" in

the future (No. 384, pet. brief, pp. 35-36, 85). But if such a provision might become invalid in the future, it was equally invalid in the past.

IV.

Respondent in No. 591 is in error in asking this Court to consider the question of state law involved in the claim of *res ajudicata*.

The respondents in No. 591 have urged that they may bring forward any ground, whether Federal or non-Federal, in order to sustain the judgment appealed from, and have cited for this proposition *Langnes* v. *Green*, 282 U. S. 531 and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555.

Neither of these cases is applicable, since both involved appeals from a lower Federal court.

The law is expressly contrary to respondents' contention when a case is brought to this Court from a state court. *Murdock* v. *City of Memphis*, 20 Wall. 590; *Sauer* v. *New York*, 206 U. S. 536; *Monson* v. *Simonson*, 231 U. S. 341; *First National Bank* v. *Anderson*, 269 U. S. 341, 346; *Missouri* v. *Public Service Commission*, 273 U. S. 126, 131; *Robertson & Kirkham*, "Jurisdiction of the Supreme Court of the United States", p. 147.

In any event, even if the question of *res ajudicata* were open in this Court, it was not raised by said respondents in their complaint or by their motion papers in the court below.

Respectfully submitted,

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